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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIE MAE PAYNE, *et al.*, *Petitioners*,

v.

TRAVENOL LABORATORIES, INC. and
BAXTER LABORATORIES, INC., *Respondents*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October 1982

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QUESTIONS PRESENTED

1. Do this Court's holdings in General Telephone Co. of the Southwest v. Falcon, U.S. , 72 L.Ed. 2d 740 (1982) and East Texas Motor Freight System v. Rodriguez, 431 U.S. 395 (1977), requiring the courts to consider Rule 23 questions in the light of the specific facts and circumstances of the cases before them rather than by reference to abstract rules of thumb, apply to the decertification of part of a class?

2. Where the black female plaintiffs in a case brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 possessed the same interests and suffered the same injury as black males, and where they proved to the satisfaction of both courts below that black men had been discriminated against in precisely the same manner as black women, does the mere fact that the black female plaintiffs had also

brought a sex discrimination claim disqualify them from continuing to represent black males and justify the exclusion of black males from the individualized seniority relief otherwise mandated by Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and from the monetary relief otherwise mandated by Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)?

3. Where black females successfully challenged the exclusion of women from a traditionally-male entry-level job and where the challenge foreseeably had no adverse effect on any black male incumbent in that job, but where future black male applicants would have to compete with black female applicants for future positions in that job, does the mere risk of increased future job competition create the type of conflict of interest which under Rule 23(a)(4) would bar black females from representing and obtaining relief for black males on the issues of racial discrimination common to all blacks?

4. Where the original black male plaintiff withdrew from the case for personal reasons after the certification of a class which included all blacks, should that class have been treated as a continuing entity under Sosna v. Iowa, 419 U.S. 393 (1975) and Franks? If not, should the black males about to be decertified from the class have been provided with notice so that a new representative could intervene and protect them from the possible prejudice---in light of requirements of administrative exhaustion under Title VII, statutes of limitations, etc.---of having to file a new and duplicative lawsuit to enforce their rights?

1. Petitioners:

   Willie Mae Payne
   Birdie Lee Griffin
   Delilah Cherry
   Actual and potential class members who applied for employment at the defendants' plant in Cleveland, Mississippi or who were employed there.

2. Respondents:

   Travenol Laboratories, Inc.
   Baxter Laboratories, Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

WILLIE MAE PAYNE et al.,

Petitioners,

v.

TRAVENOL LABORATORIES, INC., and
BAXTER LABORATORIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Willie Mae Payne et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered on April 22, 1982.

OPINIONS BELOW

The April 22, 1982 opinion of the Court of Appeals is reported at 673 F.2d 798, and is reproduced in the separate Appendix at App. 1a-165a. The July 7, 1982 order of the Court of Appeals denying rehearing is reproduced at App. 166a-167a. The November 16, 1972 order of the district court certifying a class including black males is reproduced at App. 168a-169a. The December 20, 1974 order of the district court decertifying black males from the class is reproduced at App. 170a-172a. The February 19, 1976 opinion of the district court on liability is reported at 416 F.Supp. 248, and is reproduced at App. 173a-206a. The December 8, 1976 opinion of the district court declining to change the class definition in light of the results of trial is reported at 74 F.R.D. 14, and is reproduced at App 207a-221a. The accompanying Order is reproduced at App. 222a-224a.

The January 6, 1978 decision of the Fifth Circuit on the first appeal in this case is reported at 565 F.2d 898 and is reproduced at 225a-231a. The March 23, 1978 Order of the Fifth Circuit denying rehearing and denying rehearing en banc is reproduced at 232a. The January 24, 1979 order of the district court again declining to make any changes in the class definition is reproduced at App. 233a-234a. The July 24, 1980 Magistrate's Report and Recommendation on further injunctive relief, recommending a denial of individualized injunctive relief to black males because of their exclusion from the class, is reproduced at App. 235a-262a. The August 18, 1980 order of the district court adopting the Magistrate's Report and Recommendation is reproduced at App. 264a. The August 18, 1980 Decree is reproduced at 265a-279a.

JURISDICTIONAL STATEMENT

The opinion and judgement of the Court of Appeals were entered on April 22, 1982. App. 1a. Petitioners timely filed a petition for rehearing and a suggestion for rehearing en banc, and respondents timely filed a petition for rehearing. All petitions were denied on July 7, 1982. App. 166a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULES INVOLVED

The relevant portions of Rule 23, F.R. Civ.P., are set forth at App. 280a.

STATEMENT OF THE CASE

This case was filed in March 1972 by a black male and two black females, alleging racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and of 42 U.S.C. § 1981. On November 16, 1972, the lower court certified a class of

all black employees and applicants for employment.

On May 1, 1973, plaintiffs amended their complaint to allege sex discrimination in addition to racial discrimination. A week later, the sole black male plaintiff was allowed to withdraw because of a change in his religious views. On December 20, 1974, the lower court entered an order excluding black males from the class although they had then been members of the class for more than two years. App. 170a. There was no evidentiary hearing on the exclusion, and no written findings were entered. The basis of the lower court's oral ruling was that the sole black male plaintiff had withdrawn, and that black women's complaint that they were excluded from the traditionally-male entry-level Material Handler job category created a conflict of interest with black men who were benefitted by the reservation

of that job for men. At the December 1974 hearing, the trial court denied plaintiffs' motion that notice be sent to black males, informing them of their provisional exclusion unless one of them stepped forward as a new class representative.[1/]

At trial, both sides presented extensive evidence on the question of racial discrimination against black males, as well as on the question of racial discrimination against black females.[2/] Both lower courts found that the company had engaged in subjective disparate-treatment discrimination against black males and females in hiring and promotions, and had engaged in disparate-impact discrimination against black males and females in its educational

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1. See App. 148a n. 16, 673 F.2d at 838 n. 16.

2. The same types of statistical evidence, and the same testimony, were used to prove racial discrimination against both black males and black females.

requirements and failure to post notices of job vacancies.[3] The degree of identity between the racial discrimination claims of black males and of black females was so great that the court of appeals even held that black females could prove racial discrimination against themselves by proving racial discrimination against all blacks.[4]

After the trial, plaintiffs renewed their efforts to include black males in the class, but the district court made the exclusion final on December 8, 1976. App. 207a, 222a, 74 F.R.D. 14. On January 24, 1979, the district court again re-affirmed the exclusion of black males from the class. App. 233a.

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3. App. 62a-86a, 94a-101a, 673 F.2d at 818-24, 826-27; App. 188a-195a, 416 F. Supp. at 257-61. See Judge Goldberg's dissent, App. 142a-145a, 673 F.2d at 837-38.

4. Thus, it was necessary to decide the question of racial discrimination against black men in order to adjudicate the question of racial discrimination against black women.

The Magistrate issued his Report and Recommendation on further injunctive relief on July 24, 1980. App. 235a. In it, he recommended awarding constructive seniority and priority hiring relief to black females harmed by hiring discrimination, but stated that the exclusion of black males from the class should bar black male victims of hiring discrimination from such relief. App. 238a, 248a, 257a-258a. Plaintiffs appealed to the district court the recommended denial of such relief to black male discriminatees but on August 18, 1980, the trial court adopted the Magistrate's Report and Recommendation without change. App. 264a. All parties appealed.

A divided panel upheld the trial court's exclusion of black males from the class both before and after the trial, and upheld the denial of all individualized relief to black males notwithstanding the

findings of discrimination against them. App. 26a-39a, 673 F.2d at 809-13. Judge Goldberg dissented. App. 115a-165a, 673 F.2d at 830-42.

REASONS FOR GRANTING THE WRIT

1. The Decision Below is in Conflict With This Court's Decision Last Term in General Telephone Company of the Southwest v. Falcon.

On June 14, 1982, this Court decided General Telephone Co. of the Southwest v. Falcon, ___ U.S. ___, 72 L.Ed.2d 740 (1982). This decision was the latest step in an effort by this Court to instruct the courts of appeals to pay less attention to abstract rules of thumb, and more attention to the specific provisions and purposes of Rule 23 and the facts and circumstances of the cases before them, when deciding Rule 23 questions. See also East Texas Motor Freight System v. Rodriguez, 431 U.S. 395 (1977).

Reliance on abstract rules of thumb in unnecessarily narrowing a proper class is as great a disservice to the purposes of Rule 23 as reliance on such abstract concepts to certify an impermissibly broad class. The defect in both situations is the same: ignoring the purposes of Rule 23, and ignoring the specific facts and circumstances of the case at bar.[5/]

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5. The degree of abstraction in the divided panel's approach is best illustrated by its result. Black males were excluded from the class herein in order to "protect" them from the black female plaintiffs' assertion of a sex discrimination claim as to the Material Handler job. Their exclusion did not prevent the litigation of that sex claim; the challenge went forward, and plaintiffs prevailed. The exclusion therefore did black males no practical good. It did, however, do them quite tangible harm: it deprived them of their rights to the priority hiring accorded black female discriminatees, it deprived them of their rights to the awards of constructive seniority accorded to black female discriminatees to compensate for discriminatory delays in hire, and it deprived them of the rights to back pay accorded to black female discriminatees. In the name of "protecting" black men, black men have lost all relief in this case.

In Falcon, this Court made clear that a claim of conflict should not bar a group from a class if, on balance, the group in question had strong interests in common with the class representatives. Thus, although there may be a conflict "between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority," and although generally "the same plaintiff could not represent these classes" under Rule 23,[6] this Court nonetheless recognized that the interests of both groups could be so interrelated in fact that Rule 23 would allow their joint representation by the same plaintiff:

> If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent

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6. 72 L.Ed.2d at 750 n.13, quoting General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 331 (1980).

> employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

72 L.Ed.2d at 751 n. 15. Here, the theoretic conflict was between black males and black females, and it is undisputed that the same educational requirements were applied to blacks of both sexes, that the same subjective hiring and promotional practices were applied to blacks of both sexes, and that the failure to post notices of vacancies in better-paying jobs applied equally to blacks of both sexes. Instead of basing its decision on these factors, which boil down to a balancing of the risk of harm to black males caused by their

inclusion in the class with the harm black males would suffer by exclusion,[7] the panel majority felt that such a course would be improper:

> This argument diverts attention from the proper inquiry under Rule 23.

App. 33a, 673 F.2d at 812.

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7. While it is theoretically possible for black males to protect their interests by intervention on remand or by the filing of a new lawsuit, such a course of action would face a number of potential obstacles:

> —Would the original plaintiffs' EEOC charges suffice as the basis for Title VII jurisdiction, or would black males have to file new charges?
>
> —If black males have to file new Title VII charges, would the original plaintiffs' charges in this case toll the charge-filing period for black males in the new case, so that black males can obtain relief in the new case for the same acts of discrimination for which they could have obtained relief in this case?
>
> —Would the original plaintiffs' filing of suit under 42 U.S.C. § 1981 in this case toll the period of limitations for black males in a new case, so that the new lawsuit would cover acts of discrimination going

(footnote continued)

In Falcon, this Court also made clear that, in deciding whether to certify a class, strong weight should be given to the question whether the adjudication of the admittedly proper claims "would require the decision of any common question" concerning the challenged portion of the class, and would involve the same evidentiary approaches. 72 L.Ed.2d at 751. If so, class treatment would advance "'the efficiency and economy of litigation which is a principal purpose of the procedure.'" Id., quoting American Pipe & Construction Co. v. Utah, 414 U.S. 538, 553 (1974).

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back to March 1966, as the present suit does?

—If a new lawsuit is filed, would the claims of discrimination against black males have to be retried, thus duplicating the efforts expended in the present lawsuit and creating the risk of inconsistent adjudications?

Some of these questions are presented by a petition for certiorari in Western Electric Co. v. Hill, No. 82-393. To remit black males to this course may prejudice their rights.

Here, these requirements were clearly met but the divided panel ignored these considerations. Judge Goldberg correctly stated in his dissent:[8]

> In considering the class representatives' claims that defendant Travenol discriminated on the basis of both race and sex, the district court necessarily reviewed evidence bearing on the effect of Travenol's policies on blacks. However, the district court did not confine itself to an examination of evidence bearing upon discrimination against black women. Instead, the court specifically found that Travenol's hiring policies, educational requirements, failure to post job vacancies, and system of promotion adversely affected all blacks. In some cases, the findings were actually broken down to show the specific effect of discriminatory policies on black men.

Relegating black men to post-remand intervention or to the filing of a new and

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8. App. 142a-143a, 673 F.2d at 837 (footnotes omitted).

duplicative suit may possibly prejudice their interests,[9] but would certainly defeat the goals of Rule 23 expressed in American Pipe and reaffirmed in Falcon.

Finally, this Court in Falcon stressed the overriding importance of re-evaluating class decisions continually throughout the handling of the case, and changing the class certification and definition as appropriate in light of subsequent developments, including the handling of the class claims at trial. 72 L.Ed.2d. at 751-52. Here, the divided panel expressly rejected such a course:[10]

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9. See note 7, supra.

10. App. 31a-32a, 34a, 673 F.2d at 811-12. The contention that the results of trial have only a "one-way" importance - that they may be used only to narrow or decertify an improper or overly broad class but that they may not be used to support an expansion of an overly narrow class - has no support in the language of Rule 23 or the decisions of this Court.

> The plaintiffs argue that because both blacks and women were adequately represented at trial, the existence of a possible conflict between the two before trial is not relevant. We reject this argument. It is true that the court's responsibility to assess the adequacy of representation is an ongoing one. The district court may decertify a class after trial if plaintiff's trial performance showed him or her to be an inadequate class representative.... But the trial court is not required to hypothesize about the effect of an actual conflict of interests on the adequacy of plaintiffs' representation. It is enough to deny representation that the conflict is actual at the outset of the trial.
>
> * * *
>
> ...A court need not look beyond the issues in the suit before it to determine when a conflict of interest precludes adequate representation. We conclude, therefore, that the district court was within its discretion in excluding black males from the class.

Judge Goldberg, pointing out that the district court had reconsidered the class definition after the trial but had declined to change it,11/ stated that the lower

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11. Opinion of December 8, 1976, App. 207a, 74 F.R.D. 14; Order of December 8, 1976, App. 222a.

court's error was in failing to consider the results of trial when it reconsidered the question after the trial:

> The district court's rationale for continuing to exclude black males from the plaintiff class even after trial was that there existed a potential conflict of interest between black females and black males. In this case, to paraphrase an old adage, the proof of plaintiff's ability to represent the interests of black males was in the representation thereof. Clearly, any potential conflicts at the relief stage of the litigation did not hinder plaintiffs' counsel from presenting sufficient evidence of discrimination against black men to support the district court's findings that black men as well as women were victims of defendant's discriminatory hiring policies. What more should be required to sustain a finding that the interests of black males had been adequately represented for the purposes of Rule 23?

App. 145a-146a, 673 F.2d at 837-38.

The decision of the divided panel does not conform to the factors stressed by this Court in Falcon. Instead, the majority relied on abstract propositions that ill serve the purposes of Rule 23. The

decision should be vacated, and the case remanded for reconsideration in light of Falcon.

2. The Decision Below is in Conflict With the Decisions of Other Courts of Appeals.

The decision below is in conflict with the decisions of the Fourth, Eighth, and Ninth Circuits with respect to the type and level of conflict of interests which must arise before Rule 23(a)(4) requires the barring from class membership and relief of a group otherwise properly includable in the class. To discuss the disagreement among the Circuits, it is first necessary to discuss the nature of the "conflict" on which the divided panel based its decision.

(a) The Panel's View of the Conflict Between the Black Female Plaintiffs and Black Males

The panel expressed succinctly its

view of a conflict of interests between the black female plaintiffs and black males:[12]

> The conflict found by the district court here is straightforward: the female plaintiffs asserted that Travenol discriminates against females by typically assigning them to the lower-paying job of assembler while typically assigning males to the higher-paying job of material handler. The females, therefore, sought to establish that males were favored at their expense. This claim plainly draws the interests of males into conflict with the interests of females . . . .

The panel also quoted and relied on the district court's statement:[13]

> . . . If these black female plaintiffs are going to get into a controversy with males, either white or black, then I don't think they can represent the male population of the plant so far as males or [sic] concerned, or for that matter any males who may have any interests in retaining their jobs as material handlers.

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12. App. 28a-29a (footnote omitted), 673 F.2d at 810-11 (footnote omitted).

13. App. 23a n. 8, 673 F.2d at 809 n. 8 (emphasis supplied).

Neither the district court nor the court of appeals relied on any testimony or other evidence of conflict,[14] but found a per se conflict arising from the mere existence of a challenge - any challenge - to the exclusion of women from any traditionally-male job category.[15]

But where does the conflict lie? The panel agreed that black males had no "legally cognizable" interest in perpetuating sex discrimination,[16] so no conflict seems to arise from a mere inquiry into the fact of discrimination and the entry of a

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14. Judge Goldberg pointed out that the finding of conflict was a conclusion of law, because it was based on a view of the issues rather than on the facts of the case. App. 124a-125a, 673 F.3d at 832-33.

15. Thus, the panel was able to say that "[a] court need not look beyond the issues in the suit before it" in deciding a question of conflict. App. 34a, 673 F.2d at 812.

16. App. 32a, 673 F.2d at 811.

declaration on the subject. Black males would surely not be troubled by the company's having to pay awards of back pay to the black women harmed by that practice. The only possible area of a conflict of interests would arise from an award of injunctive relief.

Even as to an award of injunctive relief, where is the conflict? Plaintiffs never sought the "bumping" of incumbent male Material Handlers; such relief is expressly unavailable under the Fifth Circuit's "rightful place" doctrine. James v. Stockham Valves & Fittings Co., 559 F.2d 310, 356 (5th Cir.), cert. den., 434 U.S. 1034 (1978), and cases there collected. The only possible injunctive relief would be relief intended to ensure that women be treated fairly in filling future Material Handler vacancies and in

filling vacancies above that level.[17] The only "conflict" of interest that can be envisioned is that unhired black males and black male Custodians would have to compete with black women for future Material Handler positions.[18]

Judge Goldberg described such a "conflict" as "in large part illusory." App. 126a, 673 F.2d at 833. He continued:

> The trial court apparently assumed that black women plaintiffs would seek to take material handler jobs away from black men who held those positions. This assumption is incorrect. A remedial order could only

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17. The Decree entered below provided such relief. Paragraph 3 prohibits any further subjective discrimination on the basis of sex, and paragraph 4 requires the validation of any new facially neutral selection criteria. App. 265a-266a.

18. Even so, the ending of sexual discrimination in operative job categories means that black male applicants can now compete for the Assembler jobs. While lower-paying, they are a distinct improvement on unemployment.

> affect future job placements; it could not remove incumbent material handlers from their jobs. ...Thus, there would be no conflict between the interests of black females who might seek future positions as material handlers and that of black males already holding the jobs.
>
> In fact, the only potential conflict I can find in this case is that of competition between black males and females seeking material handler jobs. However, the "conflict" among these class members is indistinguishable from the conflicts inherent in any Title VII class action. Whenever a Title VII plaintiff class prevails, the class members are thrown into competition with one another, as well as with non-class members, for a limited number of jobs. However, as the Majority acknowledges, this Court has consistently rejected the contention that job competition among class members creates a conflict sufficient to defeat class certification under F.R.Civ.P. Rule 23. See, ante, at 810, n. 10. To hold otherwise would effectively destroy the class action as a procedural device for enforcing Title VII rights, for it is impossible to imagine a Title VII class action that does not involve a potential conflict among class members at the relief stage of the litigation.

App. 126a-129a, 673 F.2d at 833-34 (citations and footnotes omitted) (emphasis in

original).

(b) The Decisions of Other Courts of Appeals

In Donaldson v. Pillsbury Co., 554 F.2d 825, 830 (8th Cir.), cert. den., 434 U.S. 856 (1977), the court reversed the denial of class certification and held that the black female plaintiff could represent a class of all blacks and of all women in claims of race and sex discrimination. The panel below seeks to dismiss the case as one in which only the issue of typicality was raised, and as one in which the plaintiff had alleged only "that the defendant employer favored white men at the expense of both blacks and females." App. 29a-30a n.12, 673 F.2d at 811 n.12.

To the contrary, Donaldson is in sharp conflict with the decision of the panel below. The Eighth Circuit expressly stated that discussions of typicality

include considerations of the absence of conflicts of interest, 554 F.2d at 879, and expressly stated that the plaintiff met the adequacy-of-representation requirement of Rule 23(a)(4). 554 F.2d at 831 n.5. As to the issues presented in Donaldson, the Eighth Circuit described claims almost identical to the claim that led the panel below to find an insuperable conflict:

* * *

> (c) separate hiring offices (until January 1973) for men and women with job limitations on women not applicable to men,

* * *

554 F.2d at 830.

Similar issues of conflict have arisen in Title VII cases in which a union has sued on behalf of a class of its female members or on behalf of a class of its black members. By challenging discrimination against part of its membership, each such union was necessarily increasing the job or salary competition its white members or its male members would face in the future. Indeed, several employees have sharpened their conflict-of-interest objections to such class representation by filing counterclaims against the union plaintiffs, seeking contribution for whatever back pay might ultimately be awarded.

The divided panel's per se rule in this case would clearly foreclose such class representation by a union. However,

other courts of appeals have generally held that such a level of conflict is not sufficient, in and of itself, to make the union an inadequate class representative. Int'l Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1268-69 (4th Cir., 1981) ("Neither is Chesapeake Bay helped because the Union for purposes of this case is representing only blacks and women and not its white male members. There is no basis in the record for finding intraunion conflict at this juncture."); Social Services Union, Local 535 v. County of Santa Clara, 609 F.2d 944, 948 (9th Cir., 1979) ("[A]ny potential economic conflict between male and female employees is too amorphous and speculative to disqualify the union from representing the

[sex discrimination] class."); Int'l Woodworkers of America v. Georgia-Pacific Corp., 568 F.2d 64, 67-68 (8th Cir., 1977) (rejecting the claim of "a supposedly inherent conflict of interest between the white members of IWA and the alleged discriminatees.").

In each of these cases, the employer argued for a per se rule, based on a look at the issues. This was the approach taken below. The Fourth, Eighth, and Ninth Circuits all rejected such a claim, and held that the type of conflict necessary to bar class representation must be fully developed in an evidentiary record. In this case, the trial record itself demonstrates that there is no real conflict between black males and black females, but

the majority held that a trial record has only "one-way" relevance: it can be used to decertify an existing class, but may not be used to show the incorrectness of an assumption of conflict. As the Seventh Circuit aptly stated in McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 422 (7th Cir., 1977), in rejecting a claim of conflict:

> Per se rules often represent the abdication of judicial discretion rather than its informed exercise.

3. The Court of Appeals has Decided an Important Question of Federal Law which Should be Decided by this Court to Avoid the Undermining of its Decisions in Albermarle Paper Co. v. Moody and Franks v. Bowman Transp. Co.

In Franks v. Bowman Transp. Co., 424 U.S. 747, 770-71 (1976) and in Albermarle

Paper Co. v. Moody, 422 U.S. 405, 417-22 (1975), this Court held that, where discrimination has been found, a court must exercise its discretion "to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." Both Franks and Albemarle Paper cautioned that a court may only use its discretion to deny relief "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination ... and making persons whole for injuries suffered through past discrimination." Albemarle Paper, 422 U.S. at 421; Franks, 424 U.S. at 774. Relief may be denied "only on the basis of unusual adverse impact arising from facts and circumstances that would not

be generally found in Title VII cases." 424 U.S. at 779 n.41. If they are to have meaning, these principles must apply with equal vigor to the denial of relief where it was accomplished by a restriction on class membership.

The type of "conflict" alleged here will exist in many class actions. The district court's rationale for the exclusion of black males from the class would, if applied generally, frustrate the goal of providing complete relief to the victims of discrimination. Indeed, it was not a black male---but an employer anxious to reduce its liability---which urged the importance of the conflict before both the lower court and this Court.

Unless the decision below is vacated or reversed by this Court, employers will

quickly seize on it as a means of eliminating or reducing liability to the victims of their discrimination, under the guise of concern for the rights of such victims. If a lawsuit challenges an educational requirement but the named plaintiff ultimately obtained a G.E.D. equivalency certificate, the employer will point to a conflict between those who ultimately satisfied the requirement and those who did not.[19]

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[19] The district court accepted such an argument here, and decertified from the class all black women who failed to meet the requirement. App. 170a-171a. That exclusion has not yet been reviewed, because the court of appeals had earlier declined to grant permission for the appeal under 28 U.S.C. §1292(b).

If a lawsuit challenges an employer's requirement that applicants be referred by a State Employment Service before they will be considered for employment, and if the named plaintiffs ultimately obtained such referrals after earlier discriminatory refusals to refer them, the employer will point to a conflict between those who were referred and those who were not referred.[20]

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[20] The district court accepted such an argument here, and decertified from the class all black women who failed to meet the requirement of referral by the Mississippi State Employment Service, if they applied while that requirement was in effect. App. 170a-171a. This exclusion, too, will be reviewable at the end of the case.

Under the panel decision as it stands, the extent of an employer's classwide liability will be measured more by the ingenuity of its counsel than by the degree of its discrimination.

The employer's asserted concern for the welfare of some of the victims of its discrimination does them no practical good. As Judge Goldberg has pointed out, the task of adjusting relief among various groups at the remedial stage---such as the priority hiring relief for a given number of vacancies denied to blacks, constructive seniority determinations, and the like ---can protect the interests of black males only if they are before the Court as class members. Thus, their exclusion will prejudice, rather than protect, their interests. App. 131a-133a, 673 F.2d at 834-35.

4. The Panel's Refusal to Treat the Certified Class of all Blacks as an Independent Juridical Entity, Surviving the Withdrawal of the Black Male Plaintiff, Conflicts with the Decisions of this Court

The divided panel relied on the withdrawal of the sole black male plaintiff, more than two years after a class including black males had been certified, to find that the black males were not adequately represented and thus that they were properly decertified from the class. App. 34a-35a, 673 F.2d at 812-13. This holding is in sharp conflict with this Court's doctrine that a class becomes a separate

juridical entity after it has been properly certified, and that such a class survives the mootness, expiration, or lack of merit of the named plaintiff's claim. That the named plaintiff no longer has a personal stake in the case does not matter, for the class itself has a stake. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 398-99 (1980); Zablocki v. Redhail, 434 U.S. 374, 382 n.9 (1978); Franks v. Bowman Transp. Co., 424 U.S. at 753-54; Sosna v. Iowa, 419 U.S. 393, 399-403 (1975). The important factor is that the plaintiff was a proper class representative at the time of class certification, and that there is now a live controversy between the class of black males and the defendants. Zablocki, 434 U.S. at 382 n.9; Franks, 424 U.S. at 755-56; Sosna, 419

U.S. at 402; Wilkinson v. Abrams, 627 F.2d 650, 656 n.8 (3rd Cir., 1980).

Under these decisions, no new class representative was necessary.[21]

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[21] The panel below sought to avoid these decisions by arguing that the absence of a black male plaintiff prevented subclassification, as a means of removing conflict within the same class. App. 34a-35a, 673 F.2d at 812. This Court has never held that subclassification is necessary to avoid abstract notions of conflict; even if it had so held, however, subclassification by issue is permissible under the clear language of Rule 23(c)(4), F.R. Civ. P., App. 280a. The trial court could have certified a subclass of all blacks affected by the same racial discrimination as the named plaintiffs, and a subclass of all women affected by the same sexual discrimination as the named plaintiffs. The benefit of subclassification is that it aids the Court in ensuring that distinct groups are treated fairly, and this benefit can be achieved whether or not the subclasses have different representatives.

5. The Decision of the Court of Appeals that no Notice Need be Provided the Members of a Certified Class, Before the Voluntary Withdrawal of a Class Representative Results in Their Decertification and the Dismissal of Their Claims, Involves an Important Question of Federal Law Which Should be Decided by This Court.

The panel held that the trial court was under no obligation to provide notice of their provisional decertification to black males, so that one or more of them could step forward and become a class representative. The panel did agree that the lower court had the power to give notice, and that the giving of such notice should be encouraged, but held that

Rule 23(e), F.R.Civ.P., did not require notice.[22]

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[22] The panel stated that plaintiffs had not relied on Rule 23(e). App. 35a-36a n.14, 673 F.2d at 812 n.14. This is incorrect. There is no dispute that plaintiffs asked the trial court to send a notice to black males before their exclusion from the class, see the dissent at App. 148a, 673 F.2d at 838, and the omission of a specific citation to the rule providing for such notice did not make their motion ineffective. See also Judge Goldberg's discussion of the obligation Rule 23(e) imposes upon the trial court to act sua sponte where necessary. App. 151a n.19, 673 F.2d at 839 n.19.

The panel held that the dismissal of the claims of a substantial part of a certified class, because of a voluntary withdrawal by a single plaintiff and despite the merits of those claims, is not a "dismissal" within the meaning of Rule 23. This attaches too much importance to what should be an irrelevant question: whether other claims in the case had been joined with those of black males. Surely the black males here have lost as much as if the case had been brought solely on their behalf, and then been dismissed after certification. Rule 23(e) clearly applies to the dismissal of all claims of a class, and no reason appears why its policy should not apply to the dismissal of all claims of a discrete group within a certified class.

This Court has held that mandatory notice requirements apply to voluntary dismissals of claims, "to prevent plaintiffs from selling out" the persons they represent. Burks v. Lasker, 441 U.S. 471, 485 n.16 (1979). The same result must follow when a particular plaintiff takes a voluntary withdrawal and the result is the dismissal of the claims of all black males. Judge Goldberg discussed the danger to the integrity of the judicial process posed by the panel's approach:

> Rule 23(e) is designed to serve at least two important purposes. First, it protects absent class members who may be relying upon the pendency of a class action from being prejudiced if their named representative should choose to drop his (and their) action. Second, the Rule is a prophylactic device, a safeguard designed to discourage collusion. Without Rule 23(e), class action defendants

> might seek to "buy off" class representatives in an effort to "turn off" a class action.
>
> Without in any way questioning the piety or sincerity of the named plaintiff who chose to withdraw from this case, we must recognize that his fortuitous departure from the lawsuit did result in the exclusion of all black males from the plaintiff class--a valuable boon to defendants. Thus, one can readily see the grave potential for abuse which will follow from the Majority's holding that Rule 23(e) notice is not required in a case such as this. Under the rule set forth by the Majority, future class action defendants may be tempted to quietly secure the withdrawal of the named class representative and thereby "turn off" the class action. If, as the Majority holds, Rule 23(e) can be ignored, there will be nothing to prevent such collusion.

App. 153a-154a, 673 F.2d at 839-40 (footnotes omitted). The issue is important, and worthy of this Court's consideration.

CONCLUSION

For the reasons stated above, petitioners pray that this Court grant their petition for a writ of certiorari and set this case for argument or, in the alternative, vacate and remand this case for further consideration in light of Falcon.

Respectfully submitted,

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